

2008

# Beyond Incoherence: The Roberts Court's Deregulatory Turn in *FEC V. Wisconsin Right to Life*

Richard L. Hasen

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

---

## Recommended Citation

Hasen, Richard L., "Beyond Incoherence: The Roberts Court's Deregulatory Turn in *FEC V. Wisconsin Right to Life*" (2008).  
*Minnesota Law Review*. 592.  
<https://scholarship.law.umn.edu/mlr/592>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## Article

# Beyond Incoherence: The Roberts Court's Deregulatory Turn in *FEC v. Wisconsin Right to Life*

Richard L. Hasen<sup>†</sup>

Since 1976, the Supreme Court's approach to campaign finance law has swung like a pendulum, with periods of Court deference to regulation alternating with a more skeptical approach that views the First Amendment as barring much campaign finance regulation.<sup>1</sup> The end of the Rehnquist Court saw the Court in its most deferential posture ever, with a jurisprudence notable not only for its deference but also for its incoherence.<sup>2</sup> The Court, in its "New Deference" cases,<sup>3</sup> spoke the language of anticorruption, but it was moving ever closer toward endorsing an equality rationale for campaign finance regula-

---

<sup>†</sup> William H. Hannon Distinguished Professor of Law, Loyola Law School, Los Angeles. I filed a pro bono amicus brief with Professor Richard Briffault supporting the government's position in *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652 (2007). Brief Amici Curiae of Richard Briffault and Richard L. Hasen in Support of Appellant and Intervenor-Appellants, *WRTL II*, 127 S. Ct. 2652 (Nos. 06-969, 06-970), 2007 WL 608164 [hereinafter Brief Amici Curiae]. Thanks to Bob Bauer, Richard Briffault, Bruce Cain, Rick Garnett, Dan Lowenstein, Roy Schotland, Brad Smith, and participants at the American Political Science Association panel where I presented an earlier version of this paper for useful comments and suggestions, and to Alex Chen and John Khosravi for research assistance. Copyright © 2008 by Richard L. Hasen.

1. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 105–20 (2003) (tracing the swings through 2002).

2. See generally Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004).

3. See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 891 (2005) (discussing the "New Deference Quartet" of Supreme Court cases).

tion,<sup>4</sup> which the Court had explicitly rejected in the 1976 *Buckley v. Valeo* decision.<sup>5</sup>

Now, with the replacement of Chief Justice William Rehnquist and Justice Sandra Day O'Connor with Chief Justice John Roberts and Justice Samuel Alito, the pendulum has swung sharply away from deference toward perhaps the greatest period of deregulation we will have witnessed since before Congress passed the important Federal Election Campaign Act Amendments of 1974.<sup>6</sup> In 2006, the Court in *Randall v. Sorrell* for the first time struck down individual contribution limits in candidate elections as too low.<sup>7</sup> In 2007's *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*,<sup>8</sup> the Court mostly eviscerated a key aspect of the McCain-Feingold law<sup>9</sup> limiting corporate and union spending in federal elections.<sup>10</sup> More importantly, a new Court majority has signaled its receptivity to many more challenges to campaign finance laws.

As Part I of this Article explains, as a matter of jurisprudence, the Roberts Court's new approach to campaign finance regulation is just as incoherent as the prior New Deference approach,<sup>11</sup> though moving in a decidedly different ideological direction. Likely in an effort to appear "moderate" or "minimalist,"<sup>12</sup> Chief Justice Roberts and Justice Alito have made their deregulatory moves without expressly overturning existing precedent, leading Justice Antonin Scalia in *WRTL II* to decry Chief Justice Roberts's and Justice Alito's "faux judicial restraint,"<sup>13</sup> an approach Justice Scalia says "obfuscate[s]"<sup>14</sup> the Court's *sub silentio* overruling of precedent. Justice Scalia is right (if impolitely blunt): given Chief Justice Roberts's and

---

4. See *id.* at 907–08.

5. 424 U.S. 1, 48–49 (1976) (per curiam).

6. Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, and 47 U.S.C.).

7. 126 S. Ct. 2479, 2500 (2006).

8. 127 S. Ct. 2652 (2007).

9. See Bipartisan Campaign Reform Act of 2002 § 101, 2 U.S.C. § 441i(a) (Supp. V 2007).

10. See *infra* Part II.

11. For my analysis of *Randall*'s incoherence, see generally Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing After Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007).

12. These were major themes in the confirmation hearings of Chief Justice John Roberts. See Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005, at A1.

13. *WRTL II*, 127 S. Ct. at 2683–84 n.7 (Scalia, J., concurring).

14. *Id.*

Justice Alito's views of the First Amendment and campaign finance regulation, there is no jurisprudential reason (though there are political reasons) for the two newest Justices not to join Justice Scalia's concurring opinion expressly calling for overruling of the precedent of deference.

As Part II details, however, the lack of jurisprudential consistency described in Part I will be inconsequential for the politics on the ground. Beyond incoherence, the *WRTL II* principal opinion removes effective limits on corporate and labor union spending from their general treasury funds in elections. The only ads that may not be paid for with such funds are those that expressly advocate the election or defeat of candidates for office and those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."<sup>15</sup> There are debatable issues around the edges of interpreting this new test, but those disagreements are likely to be mostly of interest to academics and to those who will deliberately craft advertisements to further push the development of deregulatory jurisprudence. The new test will not pose a formidable obstacle for those corporations and unions that wish to run ads to influence elections, though it could potentially deter some spending on the most personal of attack ads. As a result, a significant rise in corporate election-related spending may occur.

Finally, Part III looks at the next likely challenges to campaign finance regulation and how the Roberts Court is likely to address them. Though the Roberts Court's faux minimalist approach allows for some variation in how lower courts will address campaign finance challenges in the near term, the lower courts' pre-*McConnell*<sup>16</sup> experience demonstrates that many courts are likely to strike down ever more campaign finance regulations on First Amendment grounds. Those few appellate courts that uphold such laws likely will face Supreme Court reversal. There may be challenges to laws that have been upheld by the Supreme Court in the past. For instance, laws banning corporate and union spending from treasury funds on "express advocacy" (such as an ad that says "Vote for Bush!"),<sup>17</sup> the McCain-Feingold ban on contributing "soft money" to political

---

15. *Id.* at 2667 (majority opinion).

16. *McConnell v. FEC*, 540 U.S. 93 (2003).

17. *See* 2 U.S.C. § 441b (2000).

parties,<sup>18</sup> federal individual campaign contribution limits,<sup>19</sup> and laws requiring disclosure of electioneering communications.<sup>20</sup> I also expect to see challenges to laws that the Supreme Court has not directly addressed, such as a challenge to the constitutionality of contribution limits to independent expenditure committees and “527” organizations.<sup>21</sup> I believe many of these challenges will succeed.

If the current five members of the Court ruling for the challengers in *WRTL II* remain on the Court, little will be left of campaign finance regulation beyond campaign finance disclosure within a decade. Moreover, even a replacement of one of those Justices by a Democratic president might not change the deregulatory swing. The pendulum may be stuck in the deregulatory position for some time.

## I. THE NEWEST CAMPAIGN FINANCE INCOHERENCE: *WISCONSIN RIGHT TO LIFE*

### A. CAMPAIGN FINANCE INCOHERENCE BEFORE *WISCONSIN RIGHT TO LIFE*

For more than thirty years, the Supreme Court’s campaign finance jurisprudence has been a jumble of contradictions.<sup>22</sup> At issue is the clash between the public’s interest in limiting the sources and amounts of money spent on elections in order to prevent corruption or promote political equality and the burdens that such regulations place on First Amendment rights of free speech and association. In *Buckley v. Valeo*, itself the product of a compromise and drafted by a committee of Justices,<sup>23</sup> the Supreme Court established that the amounts of campaign contributions could be limited to prevent corruption or

---

18. See Bipartisan Campaign Reform Act of 2002 § 101, 2 U.S.C. § 441i(a) (Supp. V 2007).

19. See 2 U.S.C. § 441a(a)(1) (2000 & Supp. V 2007).

20. See *id.* § 434(f)(2)(A), (B), (D) (Supp. V 2007).

21. See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 970–99 (2005); see also DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 56–64 (3d ed. Supp. 2007), available at <http://electionlawblog.org/archives/2007-supp-final.pdf>.

22. See HASEN, *supra* note 1, at 105–20 (providing an extensive review of Supreme Court campaign finance jurisprudence); see also Hasen, *supra* note 2, at 35–58.

23. Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 241 (2003).

the appearance of corruption.<sup>24</sup> However, the limits on spending of money could not be justified by an anticorruption interest, because of the lack of evidence that independent spending could corrupt candidates. Nor could the limits be justified on equality grounds because doing so would be "wholly foreign" to the First Amendment.<sup>25</sup> The Court declared that limits on the amount of contributions only "marginally" restricted First Amendment rights and were therefore subject to lower congressional scrutiny. Spending limits, however, more directly limited speech and were therefore subject to strict scrutiny.<sup>26</sup>

Since *Buckley*, the Court's jurisprudence has moved in fits and turns. Different Court majorities have either showed deference toward legislative efforts to regulate campaign finances or showed hostility to such regulation on First Amendment grounds. Throughout these shifts between deference and deregulation, however, the Court has yet to formally overturn any of its campaign finance precedents.

Thus, on contributions, *Buckley* upheld the federal \$1000 individual contribution limit.<sup>27</sup> But despite *Buckley*'s holding that restrictions on the *amount* of contributions entail only a marginal restriction on speech, the Court soon held that limits on contributions to a local ballot measure committee could not be sustained because there was no candidate to corrupt.<sup>28</sup> Two decades after *Buckley*, the Court upheld a \$1075 contribution limit in Missouri state elections against a challenge that the amount was too low for challengers to mount an effective campaign,<sup>29</sup> despite the fact that the \$1000 limit was worth only a fraction of the value of *Buckley*'s \$1000 contribution limit in *Buckley*'s 1976 dollars.<sup>30</sup>

---

24. See 424 U.S. 1, 28–29 (1976) (per curiam). By "contributions," I mean money given to candidates or committees or money spent *in coordination* with a candidate or committee. "Spending" means independent spending supporting or opposing candidates for office.

25. See *id.* at 45–51.

26. See *id.* at 20–21, 44–51.

27. See *id.* at 35. The Court also upheld an aggregate annual \$25,000 individual contribution limit to federal candidates, parties, and political committees. *Id.* at 38.

28. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299–300 (1981) ("Whatever may be the state interest . . . in regulating and limiting contributions to or expenditures of a candidate[,] . . . there is no significant state or public interest in curtailing debate and discussion of a ballot measure.").

29. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382–83, 397–98 (2000).

30. See *id.* at 382, 395–97.

In that case, *Nixon v. Shrink Missouri Government PAC*, the Court expressed such a deferential standard for review of a constitutional challenge to the amount of campaign contributions<sup>31</sup> that it was hard to see any contribution limit failing constitutional scrutiny as too low.<sup>32</sup> Yet only a few years later, after Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor, the Court, virtually ignored but did not expressly overturn *Shrink Missouri*. The Court held that Vermont's campaign contribution limits were too low, and that the amounts needed to be high enough to allow for meaningful political competition.<sup>33</sup>

The path has been equally tortured on the spending side of the Court's jurisprudence. The Court followed *Buckley's* striking down of spending limits for individuals and candidates with a ruling for entities just a few years later. In *First National Bank of Boston v. Bellotti*, the Court struck down limits on spending by corporations in ballot measure elections.<sup>34</sup> The Court took an expansive view of corporate free speech rights.<sup>35</sup> However, the Court dropped an important footnote suggesting corporate spending limits in *candidate* elections might be permissible to prevent corruption of candidates.<sup>36</sup> This footnote is in tension with *Buckley's* statement that independent spending by individuals cannot corrupt candidates because of the absence of the possibility of a quid pro quo.<sup>37</sup>

The Court then held in *FEC v. Massachusetts Citizens for Life (MCFL)* that nonprofit ideological corporations that do not take corporate or union money cannot be limited in spending their treasury funds in candidate elections.<sup>38</sup> However, only a few years later the Court confirmed that for-profit corporations

---

31. See *id.* at 386–90.

32. See Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave,"* 17 CONST. COMMENT. 483, 497 (2000).

33. *Randall v. Sorrell*, 126 S. Ct. 2479, 2499–500 (2006).

34. 435 U.S. 765, 767–70, 795 (1978).

35. See *id.* at 784–86.

36. *Id.* at 788 n.26.

37. See *Buckley v. Valeo*, 424 U.S. 1, 45–47 (1976) (per curiam); see also *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2678 n.4 (2007) (Scalia J., concurring) (commenting on the *Bellotti* footnote and stating that "[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures" (discussing *Bellotti*, 435 U.S. at 788 n.26)).

38. 479 U.S. 238, 241, 263 (1986).

could be so limited.<sup>39</sup> The Court did not address whether corporate limits might be justified to prevent corruption of candidates, as the Court had suggested in *Bellotti*.<sup>40</sup> The Court did hold that the law was justified to prevent a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>41</sup> Though the Court called this interest one in preventing "corruption,"<sup>42</sup> it really represented an embrace of the equality rationale, at least as to corporations,<sup>43</sup> which the Court had rejected in *Buckley*.<sup>44</sup>

The Court then appeared to backpedal even further from *Bellotti*. In *FEC v. Beaumont*, the Court held that even MCFL-type corporations could be barred from making *any* campaign contributions, adding that

corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving information. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.<sup>45</sup>

Then, in *McConnell v. FEC*,<sup>46</sup> the Court reaffirmed *Austin v. Michigan Chamber of Commerce*.<sup>47</sup> The Court extended *Austin*'s holding to unions<sup>48</sup> without explaining why unions, which amass wealth in a much more egalitarian way than corporations, presented the same "distortion" dangers of corporations recognized in *Austin*.<sup>49</sup> The *McConnell* Court said that corporations and unions could exercise their First Amendment rights through other means, such as raising money for a separate political action committee (PAC, sometimes referred to as "sepa-

---

39. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55, 668–69 (1990).

40. *See Bellotti*, 435 U.S. at 788 n.26.

41. *Austin*, 494 U.S. at 660.

42. *See id.* at 659–60.

43. *See HASEN*, *supra* note 1, at 111–14.

44. *See Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

45. 539 U.S. 146, 161 n.8, 162–63 (2003) (citations omitted).

46. 540 U.S. 93 (2003).

47. 494 U.S. 652.

48. *See McConnell*, 540 U.S. at 205, 207–09.

49. *See Austin*, 494 U.S. at 660.



rately segregated fund”) that could then spend money on election-related activities and make contributions to candidates.<sup>50</sup>

*Shrink Missouri* and *McConnell* represented the most important in a series of New Deference cases in which the Court continued to speak the anticorruption language of *Buckley* but whose holdings appeared in serious tension with the anticorruption rationale.<sup>51</sup> The cases were better understood as moving toward an equality rationale for campaign financing.<sup>52</sup> In particular, these cases seem to endorse the “participatory self-government” rationale for campaign finance regulation put forward by Justice Stephen Breyer in a concurring opinion in *Shrink Missouri*<sup>53</sup> and in a chapter in his book, *Active Liberty*.<sup>54</sup>

Had the Court expressly adopted Justice Breyer’s views, the Court’s campaign finance jurisprudence would have become more coherent. Many would have disagreed with an adoption of the participatory self-government rationale, but at least the holdings of the cases would have matched up better with their reasoning. I had speculated that the incoherence in these cases stemmed mostly from a desire to keep Justice O’Connor in the Court majority in these cases. She may have been reluctant, especially given her earlier history, to expressly embrace an equality rationale for campaign finance.<sup>55</sup>

With Justice O’Connor’s replacement with Justice Alito, I had suggested that major changes could take place in the Court’s campaign finance jurisprudence.<sup>56</sup> And indeed major changes seem afoot. But it also appears that incoherence continues to define the Court in this area. In the Roberts Court’s first major campaign finance decision, *Randall v. Sorrell*,<sup>57</sup> the

---

50. *McConnell*, 540 U.S. at 203–06; see also Richard L. Hasen, *Justice Souter: Campaign Finance Law’s Emerging Egalitarian*, 1 ALB. GOV’T L. REV. 169, 183–87 (2008) (discussing the regulation of labor unions under egalitarian views of campaign finance regulation).

51. See Hasen, *supra* note 2, at 31–34, 42–43.

52. See *id.* at 31, 57–60.

53. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400–01 (2000) (Breyer, J., concurring).

54. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 39–55 (2005).

55. See Hasen, *supra* note 2, at 32 n.7.

56. Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 676–78 (2006).

57. 126 S. Ct. 2479 (2006). The Court did decide one campaign finance case with Chief Justice Roberts, but not Justice Alito, on the Court. That was the first *WRTL* case. See *Wis. Right to Life, Inc. v. FEC (WRTL I)*, 546 U.S.

Court split three ways in considering whether Vermont's campaign spending limits were too low. Three Justices would have upheld the limits,<sup>58</sup> three would have ruled that virtually all campaign finance limits violate the First Amendment,<sup>59</sup> and Justice Breyer, joined by the two newest Justices, struck down the limits on grounds that they were too low to allow adequate political competition.<sup>60</sup> The Court's *Randall* decision was both inconsistent with earlier campaign finance and election law cases on the issue, as well as internally inconsistent, using competition only selectively as a constitutional touchstone and imposing a test for the constitutionality of campaign contribution limits that would be difficult to apply in a consistent way.<sup>61</sup> It had the feel of an opinion from the Court in transition.<sup>62</sup>

As will be demonstrated, *WRTL II* shows the emergence of a new Court majority, one tending much more toward the First Amendment deregulatory position. But *WRTL II* did not adopt the coherent, if also controversial, deregulationist position of Justices Scalia and Clarence Thomas (and now perhaps Justice Anthony Kennedy), which views virtually all contribution and spending limits as unconstitutional. Rather *WRTL II* purports to explain its radical holding as in harmony with the more deferential cases to have come before it. Before turning to that incoherence, I place the *WRTL II* controversy in context.

#### B. PUTTING *WRTL II* IN CONTEXT: MCCAIN-FEINGOLD, MCCONNELL, AND THE PAC REQUIREMENT FOR CORPORATE AND UNION EXPRESS ADVOCACY AND ELECTIONEERING COMMUNICATIONS

The origins of the dispute at issue in *WRTL* reach back to even before the 1976 *Buckley* opinion.<sup>63</sup> In the Federal Election

---

410 (2006) (per curiam); see also *infra* notes 97–110 and accompanying text (explaining the procedural history of the *WRTL* decisions).

58. See *Randall*, 126 S. Ct. at 2511 (Souter, J., dissenting).

59. *Id.* at 2501 (Kennedy, J., concurring); *id.* at 2501–02 (Thomas, J., concurring).

60. *Id.* at 2485, 2498–95, 2499 (plurality opinion).

61. See Hasen, *supra* note 11, at 869–78.

62. See *id.* at 890 (“*Randall* may turn out to be a blip before a dramatic shift on the Court toward deregulation or, less likely, back toward the New Deference. But despite the swings in the past and the potential for future swings, the one consistent feature of the Court’s campaign finance jurisprudence has been incoherence. Unfortunately, *Randall* does nothing to improve the Court’s jurisprudence on that score.”).

63. Portions of the next few paragraphs are drawn from Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Con-*

Campaign Act (FECA) Amendments of 1974,<sup>64</sup> The amendments limited any spending “relative to a clearly identified candidate [in federal elections]”<sup>65</sup> and required “[e]very person . . . who makes contributions or expenditures” . . . ‘for the purpose of . . . influencing’ the nomination or election of candidates for federal office”<sup>66</sup> to disclose the source of such contributions and expenditures.<sup>67</sup> The *Buckley* Court recognized a vagueness problem; people engaging in political speech might well not know if the statutes cover their conduct.<sup>68</sup> Vague statutes raise due process issues<sup>69</sup> and First Amendment concerns.<sup>70</sup>

To deal with vagueness, the Court construed the statutes as reaching only “communications that in express terms advocate the election or defeat of a clearly identified candidate.”<sup>71</sup> Such *express advocacy* required definite words “of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject.’”<sup>72</sup> Still, the Court struck down the spending limits as violating the First Amendment,<sup>73</sup> though it upheld the disclosure requirements.<sup>74</sup>

*Buckley* thus left advertisements intended to or likely to influence the outcome of an election, but lacking words of express advocacy as unregulated by FECA. These advertisements were referred to as “issue advocacy,”<sup>75</sup> even though the prime issue at stake in many of these advertisements was the election or defeat of a candidate.<sup>76</sup> Advertisements lacking express advoca-

---

*stitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1775–77 (2001).

64. Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, and 47 U.S.C.).

65. *Id.* sec. 101(a), § 608(e)(1), 88 Stat. at 1265 (codified at 18 U.S.C. § 608(e)(1) (Supp. IV 1975) (repealed 1976)); *see also* *Buckley v. Valeo*, 424 U.S. 1, 41 (1976) (per curiam) (quoting 18 U.S.C. § 608(e)(1)).

66. *See Buckley*, 424 U.S. at 77 (quoting 2 U.S.C. § 434(e) (Supp. IV 1975)).

67. *See id.* at 74–75, 77.

68. *See id.* at 40–44, 76–78.

69. *Id.* at 77.

70. *See id.* at 40–41.

71. *Id.* at 44; *see also id.* at 80 (construing the term “expenditure” to have the same meaning in 2 U.S.C. § 434(e) as the Court earlier construed it in 18 U.S.C. § 608(e) (Supp. IV 1975) (repealed 1976)).

72. *Id.* at 44 n.52.

73. *See id.* at 48–51.

74. *See id.* at 80–82.

75. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 126 (2003).

76. *See id.* at 126–27.

cy but criticizing a member of Congress in the weeks before the election could be paid for with corporate or union funds—indeed, it was not necessary to disclose the source of funding.<sup>77</sup> The conduct escapes FECA because it avoided magic words.<sup>78</sup>

Sham issue advocacy became increasingly important in federal elections, with spending hitting as much as \$150 million in 1996 on such advertisements.<sup>79</sup> The figure reached at least \$275 million during the 1998 election.<sup>80</sup> By the 2000 election cycle, it rose to \$509 million.<sup>81</sup>

The Bipartisan Campaign Reform Act of 2002 (BCRA)<sup>82</sup> (more commonly known as McCain-Feingold for its two leading Senate sponsors) sought to regulate this so-called sham issue advocacy through a new “electioneering communications” test.<sup>83</sup> Under the BCRA, corporations and unions may not spend general treasury funds, but may spend PAC funds, on “electioneering communication[s].”<sup>84</sup> An electioneering communication “encompasses any broadcast, cable or satellite communication that refers to a candidate for federal office and that is aired within thirty days of a federal primary election or sixty days of a federal general election in the jurisdiction in which that candidate is running for office.”<sup>85</sup> Thus, under section 203 of the BCRA, a corporation or union could not use treasury funds to pay for a television advertisement broadcast shortly before the election

---

77. *See id.*

78. *See id.*

79. DEBORAH BECK ET AL., ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3 (1997), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Political\\_Communication/Advertising\\_Research\\_1997/REP16.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/Advertising_Research_1997/REP16.pdf).

80. *See* JEFFREY D. STANGER & DOUGLAS G. RIVLIN, ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1997–1998 ELECTION CYCLE (1998), <http://library.law.columbia.edu/urlmirror/CLR/100CLR620/report.htm>.

81. *See* Lorie Slass, *Spending on Issue Advocacy in the 2000 Cycle*, in ANNENBERG PUB. POLICY CTR., ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 3, 4 (2001), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Political\\_Communication/IssueAdIn19992000Election/2001\\_19992000issueadvocacy.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/IssueAdIn19992000Election/2001_19992000issueadvocacy.pdf); *see also* McConnell, 540 U.S. at 127 n.20 (citing Slass, *supra*, at 1–15).

82. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36 and 47 U.S.C.).

83. *See* Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, in CATO SUPREME COURT REVIEW 2006–2007, at 77, 77 (Mark K. Moller ed., 2007) (footnote omitted).

84. 2 U.S.C. § 441b(b)(2) (2000 & Supp. V 2007).

85. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2660 (2007) (citing 2 U.S.C. § 434(f)(3)(A) (Supp. V 2007)).

criticizing Senator Smith by name for her lousy Medicare plan.<sup>86</sup>

The BCRA's electioneering communications test solved the vagueness problem (the test is easy to apply and does not involve any guesswork), but it introduced a potential problem of overbreadth. An advertisement might not be intended to or likely to affect the outcome of the election, and still the advertisement would fall within the bright-line electioneering communications test section 203 of the BCRA. Thus, a television advertisement that a corporation would like to run shortly before the election urging the President running for reelection to intervene in a labor dispute could not be paid for with general treasury funds.

In *McConnell v. FEC*, plaintiffs argued that section 203 was unconstitutionally overbroad because it captured too much "genuine issue advocacy."<sup>87</sup> The three-judge district court panel hearing *McConnell* considered in detail the relevance of two social science studies (the "Buying Time" studies)<sup>88</sup> examining the question.<sup>89</sup> The judges differed on the report's findings and significance. One judge found that between 14.70% and 17.00% of the ads run before the 1998 and 2000 elections were genuine issue advertisements.<sup>90</sup> A second judge disagreed with both the 17.00% figure as well as its legal significance.<sup>91</sup> A third judge pegged the amount of such ads between 11.38% and 50.50% and, concluded that the law was overbroad.<sup>92</sup>

The Supreme Court majority opinion in *McConnell* nonetheless devoted only a single paragraph to this issue. In language that later proved to be key to the *WRTL II* case, the Court explained why the BCRA's electioneering communica-

---

86. See 2 U.S.C. § 441b(b)(2).

87. 540 U.S. 93, 204–07 (2003). The following few paragraphs are drawn from Hasen, *supra* note 2, at 52–56.

88. See generally CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BRENNAN CTR. FOR JUSTICE, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (2001); JONATHAN S. KRASNO & DANIEL E. SELTZ, BRENNAN CTR. FOR JUSTICE, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (2000).

89. *McConnell v. FEC*, 251 F. Supp. 2d 176, 307–12, 367–73 (D.D.C. 2003) (Henderson, J., concurring), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003); *id.* at 610–39, 719–52 (Kollar-Kotelly, J., concurring); *id.* at 792–99, 890–918 (Leon, J., concurring).

90. *Id.* at 798 (Leon, J., concurring).

91. *Id.* at 636 (Kollar-Kotelly, J., concurring).

92. *Id.* at 372 n.149 (Henderson, J., concurring).

tions test could constitutionally cover corporate and union broad advertisements that lacked words of express advocacy:

This argument [that the government's compelling interest in regulating issue advocacy does not apply to "electioneering communications"] fails to the extent that the issue ads broadcast during the [thirty] and [sixty] day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose. Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.<sup>93</sup>

*McConnell* left open the question whether a corporation or union could bring an "as applied" challenge to section 203 of the BCRA by proving that a broadcast advertisement the entity wished to pay for from its general treasury funds was a "genuine issue advertisement" and therefore not subject to the BCRA's restrictions. In 2004, it was not clear that *McConnell* allowed such an as-applied challenge.<sup>94</sup> *WRTL* was a test case meant to push the question.

### C. WISCONSIN RIGHT TO LIFE'S FURTHER INCOHERENCE

Wisconsin Right to Life, Inc. "is a nonprofit, nonstock, ideological advocacy corporation" recognized as tax exempt by the Internal Revenue Service.<sup>95</sup> In late July 2004, likely as a test case to push the as-applied question, *WRTL* began running a few television advertisements in Wisconsin opposing the Senate filibuster of some federal judicial nominations and urging voters to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster."<sup>96</sup> Two days later, *WRTL* filed suit in fed-

---

93. *McConnell*, 540 U.S. at 206 (citations omitted).

94. See Hasen, *supra* note 2, at 55.

95. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2660 (2007).

96. *Id.* The full text of one of the ads, "Wedding," reads as follows:

"PASTOR: And who gives this woman to be married to this man?

'BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .

eral court<sup>97</sup> seeking a declaration and an injunction that it could run the ads and pay for them from its general treasury funds as “genuine issue ads,” despite the fact that Senator Russ Feingold was running unopposed in a primary in mid-September.<sup>98</sup> WRTL did not want to use its PAC funds to pay for the ads, and it could not take advantage of the *MCFL* exemption for ideological corporations because the organization took over \$315,000 in donations from for-profit corporations to pay for the ads.<sup>99</sup>

#### 1. WISCONSIN RIGHT TO LIFE’S HOLDING

The three-judge federal district court denied WRTL’s request for a preliminary injunction, ruling that *McConnell* foreclosed all as-applied challenges.<sup>100</sup> The district court later dismissed WRTL’s complaint,<sup>101</sup> and the organization appealed to the Supreme Court. The Supreme Court heard oral argument just as Justice O’Connor was completing her term on the Court,<sup>102</sup> and issued a unanimous per curiam opinion just six

---

‘VOICE-OVER: Sometimes it’s just not fair to delay an important decision.

‘But in Washington it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple ‘yes’ or ‘no’ vote. So qualified candidates don’t get a chance to serve.

‘It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.

‘Contact Senators Feingold and Kohl and tell them to oppose the filibuster.

‘Visit: BeFair.org

‘Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee.”

*Id.* (quoting *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 198 n.3 (D.D.C. 2006), *aff’d* 127 S. Ct. 2652 (2007)). The text of the other two WRTL advertisements were similar. *See id.* at 2660–61.

97. *See id.* at 2660–61. Under a special provision of the BCRA, WRTL sought relief from a special three-judge court, with direct appeal to the Supreme Court. *See id.* at 2661; *see also* Bipartisan Campaign Reform Act of 2002 § 403, 2 U.S.C. § 437(h) (2000 & Supp. V 2007); 28 U.S.C. § 2284 (2000).

98. *WRTL II*, 127 S. Ct. at 2661, 2663.

99. *See id.* at 2697 (Souter, J., dissenting); *see also id.* at 2673 n.10 (principal opinion) (refusing to pass on the argument that the *Austin* interest in preventing corruption does not apply to a nonprofit advocacy organization such as WRTL “because WRTL’s funds for its ads were not derived solely from individual contributions”).

100. *See id.* at 2661 (principal opinion).

101. *Id.*

102. Linda Greenhouse, *Court Opens Campaign Law to Challenges*, N.Y. TIMES, Jan. 24, 2006, at A16. During that argument, Chief Justice Roberts

days after oral argument (*WRTL I*).<sup>103</sup> The Court held that *McConnell* did not preclude as-applied challenges, and remanded the case to the three-judge district court.<sup>104</sup>

On remand, the district court sided with *WRTL*. It first rejected an argument that the case was moot on grounds that the issue was “capable of repetition, yet evading review.”<sup>105</sup> On the merits, the district court split 2-1. Two of the judges, including Judge Richard Leon (one of the three district court judges in *McConnell*), held that *WRTL* was entitled to an as-applied exemption.<sup>106</sup> The majority adopted an acontextual test that looked only at the “four corners of the ads” without any context, such as the fact that the *WRTL* actively opposed Senator Feingold and his position on the filibuster of President George W. Bush’s nominees.<sup>107</sup> Because the majority viewed the ads to be something besides the functional equivalent of express advocacy, *WRTL* was entitled to an exemption.<sup>108</sup> The dissenting judge, examining the context, thought that there was a genuine issue of material effect as to the ads’ purposes and effects that should preclude summary judgment.<sup>109</sup>

The Supreme Court took the case on appeal and divided into three camps.<sup>110</sup> Three Justices (Justice Scalia, joined by Justices Kennedy and Thomas) took the position that *Austin* and *McConnell* were wrongly decided and should be overturned.<sup>111</sup> This position meant that *WRTL* could not only pay for *these* ads from its treasury funds, but that corporations and unions could pay from such funds for *any election-related advertisements*, in-

---

stated to the Solicitor General defending the law that “[i]n *McConnell* against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you’re telling us that it’s already been decided. It’s a classic bait and switch.” Transcript of Oral Argument at 24, *Wis. Right to Life, Inc. v. FEC (WRTL I)*, 546 U.S. 410 (2006) (per curiam).

103. See Greenhouse, *supra* note 102.

104. See *WRTL I*, 546 U.S. at 412.

105. *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 202 (D.D.C. 2006), *aff’d* 127 S. Ct. 2652 (2007).

106. See *id.* at 210.

107. *Id.* at 205–08.

108. *Id.* at 208, 210.

109. *Id.* at 219 (Roberts, J., dissenting).

110. All the Justices agreed that the case was not moot. See *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2662–63 (2007); *id.* at 2687 n.1 (Souter, J., dissenting) (stating that the four dissenting Justices found the case justiciable “[s]ubstantially for the reasons stated by the Court”).

111. See *id.* at 2674–87 (Scalia, J., concurring).



cluding those containing express advocacy.<sup>112</sup> Four Justices dissented (Justice David Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Breyer), believing that WRTL's ads, viewed in context, were indistinguishable from the kinds of advertising the Court in *McConnell* held it was permissible to regulate through a corporate PAC requirement.<sup>113</sup>

The decisive votes in the case belonged to the two newest Justices, Chief Justice Roberts and Justice Alito. The Chief Justice wrote an opinion (referred to by the Court as the "principal opinion") joined in full by Justice Alito, holding that WRTL was entitled to an as-applied exemption for its advertisements, but not reaching the question whether *Austin* or *McConnell* should be overruled.<sup>114</sup> Justice Alito wrote a one paragraph concurring opinion reiterating the holding of the principal opinion and adding that

it is unnecessary to go further and decide whether § 203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* that § 203 is facially constitutional.<sup>115</sup>

Given its middle position between the opinions of Justices Scalia and Souter, the principal opinion is decisive here, meaning that Chief Justice Roberts and Justice Alito now control the direction of campaign finance law on the Court.<sup>116</sup> For this reason, I focus the remainder of this Article on the principal opinion (and Justice Alito's concurrence). I explore the coherence of the Court's analysis in *WRTL II*, the likely political effects of

---

112. *See id.*

113. *See id.* at 2687–705 (Souter, J., dissenting). Justice Souter's dissent is quite interesting in its own right and is worthy of more extended consideration. *See* Hasen, *supra* note 50, at 181–92.

114. *See WRTL II*, 127 S. Ct. at 2658–74 (principal opinion).

115. *Id.* at 2674 (Alito, J., concurring) (citations omitted); *see also id.* at 2670 n.8 (principal opinion) ("[I]n deciding this as-applied challenge, we have no occasion to revisit *McConnell*'s conclusion that the statute is not facially overbroad."); *id.* at 2674 ("*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that decision today.").

116. *WRTL II* is one of the rare cases from the Court's 2006 term in which Justice Kennedy did not find himself in the middle of the Court. *Cf.* Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11 ("A new dynamic emerged in the court's last term, which ended last week with Justice Kennedy standing in the middle, all alone. Not only the lawyers, but also the [J]ustices themselves, are now in the business of courting him.").

the decision on corporate and union involvement in the electoral process, and the likely future direction of the Court's campaign finance jurisprudence.

## 2. *WRTL II*'s Principal Opinion

After resolving the mootness question,<sup>117</sup> the principal opinion then turned to the merits. The FEC and members of Congress who intervened in the case to support the FEC argued that *WRTL* should have the burden of proving that the BCRA was unconstitutional as applied to its ads.<sup>118</sup> The principal opinion disagreed, declaring that "[b]ecause BCRA [section] 203 burdens political speech, it is subject to strict scrutiny."<sup>119</sup> The opinion then noted that the Court in *McConnell* "has already ruled that the BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent."<sup>120</sup> But if the ads were not express advocacy or its equivalent, "the Government's task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling [state] interest."<sup>121</sup>

The principal opinion next considered whether the *WRTL* ads were the "functional equivalent" of express advocacy (there was no question the ads themselves contained no express advocacy). The principal opinion rejected the idea that *McConnell* had endorsed a test based upon whether the advertisement was intended to or likely to affect a federal election.<sup>122</sup> Delving into the controversial Buying Time studies,<sup>123</sup> the principal opinion argued that the reference to "intent and effect" in the *McConnell* majority opinion appeared to be derived from the tests applied by student coders in the Buying Time studies to determine the difference between genuine and sham issue ads.<sup>124</sup> It then rejected the idea that an "intent-and-effect" test could be consistent with the First Amendment, especially "given that

---

117. That part of the principal opinion was joined by Justices Scalia, Kennedy, and Thomas. See *WRTL II*, 127 S. Ct. at 2658, 2662–63.

118. *Id.* at 2663–64.

119. *Id.* at 2664.

120. *Id.*

121. *Id.*

122. See *id.* Recall that in *McConnell*, the Court declared that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

123. See *supra* note 88 and accompanying text.

124. *WRTL II*, 127 S. Ct. at 2664–65.

the methodology, data, and conclusions of the two studies were the subject of serious dispute among the [McConnell] District Court judges.”<sup>125</sup>

The principal opinion further opined that *Buckley* itself had “rejected an intent-and-effect test” in its initial analysis of FECA.<sup>126</sup> The principal opinion held that an intent test “would chill core political speech by opening the door to a trial on every ad within the terms of [section] 203 . . . . No reasonable speaker would choose to run an ad covered by the BCRA if its only defense to a criminal prosecution would be that its motives were pure.”<sup>127</sup> It also rejected an effects test as putting the speaker “wholly at the mercy of the varied understanding of his hearers” and would “typically lead to a burdensome, expert-driven inquiry, with an indeterminate result.”<sup>128</sup>

The principal opinion then set forth the appropriate test for an as-applied challenge, which it apparently conflated with the question of the meaning of the term “functional equivalent of express advocacy.”<sup>129</sup> It declared that the proper standard “must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.”<sup>130</sup> To avoid chilling speech, there must be minimal, if any discovery, and there cannot be “the open-ended rough-and-tumble of factors,” which “invit[e] complex argument in a trial court and a virtually inevitable appeal. In short, it must give the benefit of any doubt to protecting rather than stifling speech.”<sup>131</sup>

---

125. *Id.* at 2665 n.4; *see also id.* at 2665 (“The fact that the student coders who helped develop the evidentiary record before the Court in *McConnell* looked to intent and effect in doing so, and that the Court dealt with the record on that basis in deciding the facial overbreadth claim, neither compels nor warrants accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned.”). The dissenters also distanced themselves from the methodology of the Buying Time studies. *See id.* at 2701 (Souter, J., dissenting) (“To be clear, I am not endorsing the precise methodology of those studies (and THE CHIEF JUSTICE is correct that we did not do so in *McConnell*[]) . . . .” (citation omitted)).

126. *Id.* at 2665 (principal opinion). The dissent responded by noting that *Buckley* appeared to endorse the PAC alternative to deal with any problems in “doubtful” cases. *See id.* at 2700 n.17 (Souter, J., dissenting).

127. *Id.* at 2665–66 (principal opinion).

128. *Id.* at 2666.

129. *Id.* at 2667.

130. *Id.* at 2666.

131. *Id.* at 2666–67 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock, Co.*, 513 U.S. 527, 547 (1995)) (alteration in original).

The principal opinion then declared its own test, which is worth exploring in some detail: “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>132</sup> In a later footnote responding to Justice Scalia’s contention that this test was impermissibly vague, the principal opinion elaborated:

[W]e agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.<sup>133</sup>

The principal opinion found that context should “seldom play a significant role” in an as-applied challenge, adding that

[c]ourts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad “describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future,”—but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.<sup>134</sup>

The principal opinion rejected the contention that its test was inconsistent with *McConnell*:

The *McConnell* Court did not find that a “vast majority” of the issue ads considered were the functional equivalent of express advocacy. Rather, it found that such ads had an “electioneering purpose.” For the reasons we have explained, “purpose” is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy.<sup>135</sup>

Applying its “no reasonable interpretation” test to the WRTL ads, the principal opinion unsurprisingly concluded that WRTL’s ads were not the functional equivalent of express advocacy and therefore entitled to an as-applied exemption:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia

---

132. *Id.* at 2667.

133. *Id.* at 2669 n.7.

134. *Id.* at 2669 (citation omitted).

135. *Id.* at 2670 n.8. The principal opinion added its view that the “vast majority” language was dicta and not binding on the Court. *See id.*

of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.<sup>136</sup>

Justice Souter argued that the WRTL ad was indistinguishable from a hypothetical ad discussed in *McConnell* that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" <sup>137</sup> In response, the principal opinion said that WRTL's ads "did not" condemn Senator Feingold's record, but "instead t[ook] a position on the filibuster issue and exhort[ed] constituents to contact Senators Feingold and Kohl to advance that position."<sup>138</sup> The Court rejected attempts of the FEC and the intervenors to show that the ads were the functional equivalent of express advocacy, taking into account various pieces of contextual information. For example, the ads referenced WRTL's website, which included information on the Senators' position on filibusters "and allowed visitors to sign up for 'e-alerts,' some of which contained exhortations to vote against Senator Feingold."<sup>139</sup> Pointing to a survey of widespread voter ignorance about politics, the principal opinion rejected Justice Souter's dissenting argument that anyone who heard the WRTL ads would know the message was a vote against Feingold.<sup>140</sup>

The principal opinion concluded that "[a]t best" the FEC and intervenors' evidence showed the murky line between election and issue-related speech: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."<sup>141</sup>

The final portion of the principal opinion rejected the contention, not advanced by either the FEC or the intervenors, that the WRTL ads could be subject to the PAC requirement even if they did not contain the functional equivalent of express advocacy. In this discussion, the principal opinion reasserted *Bellotti's* contention that corporate political speech is entitled to great constitutional protection, and declared "[e]nough is

---

136. *Id.* at 2667.

137. *See id.* at 2667 n.6, 2684 n.7 (Souter, J., dissenting) (citing *McConnell v. FEC*, 540 U.S. 93, 126–27 (2003)).

138. *Id.* at 2667 n.6 (principal opinion).

139. *Id.* at 2669.

140. *Id.* at 2667 n.6.

141. *Id.* at 2669; *see also id.* at 2674 ("[W]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban[,] . . . we give the benefit of the doubt to speech, not censorship.").

enough" in rejecting the contention that WRTL's ads are "equivalent to contributions."<sup>142</sup> It also strongly rejected the anticircumvention rationale for campaign finance regulation—that the government should be able to regulate a large amount of campaign financing in order to prevent evasion of a law's core provisions<sup>143</sup>—which played such a central role in the New Deference cases.<sup>144</sup> It added, "We hold that the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by WRTL."<sup>145</sup>

Finally, the Court rejected the idea that the PAC alternative was sufficiently speech protective of the rights of corporations and unions:

PACs impose well-documented and onerous burdens, particularly on small nonprofits. *McConnell* did conclude that segregated funds "provid[e] corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy" and its functional equivalent, but that holding did not extend beyond functional equivalents—and if it did, the PAC option would justify regulation of all corporate speech, a proposition we have rejected.<sup>146</sup>

#### D. WRTL'S INCOHERENCE

I have consistently criticized the New Deference campaign finance opinions of the Supreme Court as lacking in coherence.<sup>147</sup> In those cases, the results reached by the Court were often at odds with the analysis the Court offered and inconsistent with prior case law. This incoherence was not inevitable. As I have argued, the Court could have reached much the same results, without such incoherence, had it explicitly adopted

---

142. *Id.* at 2672. The parties did not make the argument, but rather argued "that an expansive definition of 'functional equivalent' is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." *Id.* The Court read this argument as stating that WRTL's ads are equivalent to contributions, and added the following: "But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *Id.*

143. *See id.* at 2672–73.

144. *See* Hasen, *supra* note 2, at 45–46, 48–52; Hasen, *supra* note 3, at 904–05.

145. *See WRTL II*, 127 S. Ct. at 2673.

146. *Id.* at 2671 n.9 (citations omitted). The principal opinion also rejected the idea that a corporate speaker could use a newspaper ad or website, or change the content of its speech, to avoid the reach of section 203. *Id.*

147. For the most sustained argument, see Hasen, *supra* note 2, *passim*.

Justice Breyer's "participatory self-government" approach to the campaign finance cases.<sup>148</sup> It would have created a jurisprudence that would have been not only more honest, but also easier to apply in other campaign finance cases.

Similarly, the principal opinion in *WRTL II* is incoherent, for reasons I explain below. This incoherence was also not inevitable. The Court could have reached virtually the same results it did in *WRTL II*, without such incoherence, had it explicitly adopted the First Amendment deregulatory position of Justices Scalia and Thomas<sup>149</sup> or of Justice Kennedy.<sup>150</sup> That too would have created a more honest and more easily applied campaign finance jurisprudence. But instead the Court purported to resolve the issue in *WRTL II* without overturning a single precedent, creating even more incoherence. The principal opinion is all the more stark because it gave a ruling even broader than the plaintiff requested.

The principal opinion's jurisprudence is incoherent in at least four respects: (1) Most importantly, the principal opinion's analysis and tone is utterly incompatible with the Court's approach to the constitutionality of section 203 of the BCRA set forth in *McConnell*. (2) The principal opinion is inconsistent with the Court's prior approach to corporate political spending in candidate elections as set forth in *Austin* and *Beaumont*, and

---

148. See *id.* at 60–67.

149. See *WRTL II*, 127 S. Ct. at 2674–75.

150. In the past, Justice Kennedy has taken a position on campaign finance regulation not quite as deregulationist as Justices Thomas and Scalia. While Justice Kennedy agreed with these Justices in *McConnell* that *Austin* should be overruled, *McConnell v. FEC*, 540 U.S. 93, 323 (2003) (Kennedy, J., concurring), he parted company with them in voting to uphold one of the BCRA's soft money provisions, see *id.* at 308 (suggesting that he might still be willing to uphold some contribution limits). He also left open the possibility of recognizing a new rationale for expenditure limits. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising."). He later seems to have abandoned this position. *Randall v. Sorrell*, 126 S. Ct. 2479, 2501 (2006) (Kennedy, J., concurring) ("The Court decides the constitutionality of the limitations Vermont places on campaign expenditures and contributions. I agree that both limitations violate the First Amendment."). His decision to sign Justice Scalia's opinion in *WRTL II* is a further signal that Justice Kennedy is moving closer to the Thomas-Scalia position. For more on Justice Thomas's campaign finance jurisprudence, see Richard L. Hasen, *Justice Thomas: Leading the Way to Campaign Finance Deregulation*, FIRST AMENDMENT CTR. ONLINE, Oct. 8, 2007, <http://www.firstamendmentcenter.org/analysis.aspx?id=18958>.

reaffirmed in *McConnell*. The principal opinion compounds the inconsistency by misstating the holding of *Bellotti*. (3) The principal opinion completely ignores the “competitiveness” approach to campaign finance law set out only a year earlier in *Randall*. (4) Though the principal opinion rejects an “effects” test for separating regulable from nonregulable corporate election advertising, its own no-reasonable-interpretation test is itself an effects test. I consider each of these in turn.

#### 1. Inconsistency with the Tone and Holding of *McConnell*

The principal opinion is written in a lawyerly and sophisticated way to make it appear as though it is consistent with *McConnell* and other the earlier campaign cases. Beneath the veneer, however, is an opinion whose heart is wholly aligned with the deregulationist approach but whose words fail to match up with its intention. Its holding turns *McConnell* on its head.

It is worth beginning with the principal opinion’s tone, which is important not only for how lower courts will apply the new as-applied exception to section 203 but also for how courts will address other campaign finance questions (an issue I return to in Part III). The contrast between the Court’s view of campaign finance regulation in *McConnell* and in *WRTL II* is stark. The *McConnell* opinion was full of language about legislative deference, flexibility, political reality, and the need to give Congress the room to address campaign finance problems step-by-step.<sup>151</sup> It gave a long and fawning history tracing congressional efforts to limit big money, and especially corporate election spending, in the federal electoral process.<sup>152</sup> It spoke of the ease of evading campaign finance laws, and the need for courts to take a functional, not formal, view of what counts as election-related speech.<sup>153</sup> It minimized First Amendment concerns by noting alternative means for corporate influence over the electoral process, including PAC requirements, alternative means of communications, or even changing the content of the

---

151. See, e.g., *McConnell*, 540 U.S. at 137 (“The less rigorous standard of review we have applied to contribution limits (*Buckley*’s ‘closely drawn’ scrutiny) shows proper deference to Congress’[s] ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”).

152. See *id.* at 115–33.

153. See *id.* at 206.



electoral message such as by omitting the name of the candidate mentioned in the advertisement.<sup>154</sup>

The tone of the principal opinion in *WRTL II* is the polar opposite of *McConnell*. There is no nod to legislative deference or recognition of Congress's need to react to the "hydraulic" effect of money. Rather than talk of a PAC alternative, the *WRTL II* principal opinion mentions a free speech "ban" (or variations on the word "ban") twelve times and a speech "blackout" seventeen times. It refers to corporate election broadcasting paid for from treasury funds as a "crime" twice.<sup>155</sup> Contrast *McConnell*'s treatment of the PAC requirement: "Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation."<sup>156</sup>

The *WRTL II* principal opinion makes no mention of congressional deference (nor does it use the term "loophole," a term appearing ten times in the *McConnell* joint majority opinion),<sup>157</sup> but the term "First Amendment" appears eighteen times and variations on the word "censor" three times.<sup>158</sup> In contrast, the discussion of section 203 in *McConnell*'s joint majority opinion mentioned the First Amendment merely three times, and never to celebrate the free speech principles behind the Amendment.<sup>159</sup> Describing the First Amendment principles, the *WRTL II* principal opinion states that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it[;]"<sup>160</sup> that "[w]here the First Amendment is im-

---

154. *See id.*

155. These figures come from a word search I performed on electronic copies of *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652 (2007).

156. *McConnell*, 540 U.S. at 204.

157. This figure comes from a word search I performed on electronic copies of *McConnell*, 540 U.S. 93.

158. These figures come from a word search I performed on electronic copies of *WRTL II*, 127 S. Ct. 2652.

159. These figures come from a word search I performed on electronic copies of *McConnell*, 540 U.S. 93; *see also id.* at 205 ("In that light, we must examine the degree to which the BCRA burdens First Amendment expression and evaluate whether a compelling governmental interest justifies that burden . . . . After all, 'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office,' and '[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.'" (citations omitted)); *id.* at 208 ("The statute's narrow exception is wholly consistent with First Amendment principles.").

160. *WRTL II*, 127 S. Ct. at 2659.

plicated, the tie goes to the speaker, not the censor[;]"<sup>161</sup> and that the Court must "give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech' demands at least that."<sup>162</sup> The principal opinion and Justice Alito's separate concurrence also stressed that *McConnell*'s holding itself could well be reexamined in a future case if the new as-applied exemption recognized in *WRTL II* insufficiently protects the First Amendment.<sup>163</sup>

Beyond tone, the principal opinion, for good or for bad, effectively eviscerates *McConnell*'s holding that it is generally permissible for Congress, under section 203 of the BCRA, to require corporations and unions to pay for "electioneering communications" from a PAC. Both Justice Scalia's concurring opinion and Justice Souter's dissenting opinion recognized that the principal opinion effectively overruled *McConnell* on this point, leading Justice Scalia to decry the "faux judicial restraint" of the principal opinion.<sup>164</sup>

161. *Id.* at 2669.

162. *Id.* at 2674.

163. *Id.* (noting that the Court "today" has no occasion to revisit *McConnell*'s upholding of a facial challenge to section 203 of the BCRA); *id.* (Alito, J., concurring) (leaving the question open in the event the *WRTL* decision is insufficiently speech-protective).

164. *Id.* at 2683 n.7 (Scalia, J., concurring) ("[T]he principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so."); *id.* at 2703 (Souter, J., dissenting) ("[T]he operative opinion produces the result of overruling *McConnell*'s holding on section 203, less than four years in the Reports."); see also BeVier, *supra* note 83, at 99 ("[A]lthough it is true that Chief Justice Roberts did not explicitly overrule *McConnell*, his opinion seems to have sustained an as-applied challenge to the BCRA in First Amendment terms even broader than either *WRTL* had originally sought or many of its amici had advocated.").

In making his argument that the principal opinion effectively overrules *McConnell*, Justice Souter noted that when the BCRA was passed, Congress, concerned that its electioneering communications provision might be struck down as unconstitutional, included a backup definition to be applied in such instances. That backup definition treated as an electioneering communication

any broadcast, cable or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

2 U.S.C. § 434(f)(3)(A)(ii) (Supp. V 2007). Justice Souter wrote that "[t]his backup sounds familiar because it is essentially identical to THE CHIEF

As will be clear from Part II, it is a bit hyperbolic to claim that *WRTL II* completely overruled *McConnell*. There are some electioneering communications under which there is “no reasonable interpretation” that the advertisement is about a legislative issue, not an election. For example, consider a television advertisement paid for with corporate funds shortly before the election: “Jane Doe wants to be your president, but Jane Doe is an evil person. Don’t let her ruin the world.” But it is fair to say that the principal opinion in *WRTL II* effectively overruled *McConnell*. As Part II shows, any corporation consulting an election lawyer will be able to craft an ad that escapes coverage under section 203 of the BCRA because it is possible to build into the ad some reasonable interpretation that the ad is about a legislative issue. For example: “Jane Doe wants to be your president, but Jane Doe’s position on global warming is evil. Don’t let her ruin the world.”

By putting the burden of proof on the government to prove that a corporate- or union-funded electioneering communication is the “functional equivalent” of express advocacy and then putting forth a test for “functional equivalence” that sweeps most such advertising out of the ambit of the PAC requirement, *WRTL II* has turned the campaign finance world, created by the BCRA and upheld in *McConnell*, upside down. Rather than most electioneering communications being subject to section 203, *WRTL II* mandates that most such communications be exempted from section 203.

Importantly, the principal opinion treats *McConnell*’s analysis of the extent of the issue advocacy problem which Congress was addressing as irrelevant:

---

JUSTICE’s test for evaluating an as-applied challenge to the original definition of ‘electioneering communication’ . . . . Thus does the principal opinion institute the very standard that would have prevailed if the Court formally overruled *McConnell*.’ *WRTL II*, 127 S. Ct. at 2704 (Souter, J., dissenting); see also *id.* at 2680 (remarking that the principal opinion’s test “bear[s] a strong likeness to the BCRA’s backup definition”); Posting of Allison R. Hayward to Skeptic’s Eye, <http://skepticseye.com/2007/06/furgatch-returns-right> (June 26, 2006, 09:09 EST) (arguing that the Supreme Court adopted the Ninth Circuit’s “one plausible meaning” test for express advocacy, defined in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987)).

Though the backup definition and the principal opinion’s test for as-applied challenges are similar (as is the *Furgatch* test), there are differences between them. Most importantly, the backup definition requires words of support or opposition, 2 U.S.C. § 434(f)(3)(A)(ii), whereas *WRTL II*’s no-reasonable-interpretation test does not expressly do so. *WRTL II*, 127 S. Ct. at 2667 (principal opinion). It may have adopted a condemnation test by implication, however. See *infra* Part II.

The *McConnell* Court did not find that a “vast majority” of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an “electioneering purpose.” For the reasons we have explained, “purpose” is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express advocacy.<sup>165</sup>

Thus, the principal opinion, unlike Justice Scalia’s concurrence,<sup>166</sup> chose to ignore the political reality that under the principal opinion’s no-reasonable-interpretation test, corporations and unions will be able to run ads likely to affect (and often with the purpose of affecting) federal elections. The principal opinion also expressly tells courts to ignore valuable context in interpreting the likely effect of an advertisement.<sup>167</sup> This is in contrast to *McConnell*’s statement that “Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context.”<sup>168</sup>

Chief Justice Roberts and Justice Alito, both sophisticated judges who obviously gave the crafting of the principal opinion a great deal of thought, likely did not naively believe the no-reasonable-interpretation test would *effectively* separate election-related advertising from issue-related advertising unconnected to elections.<sup>169</sup> To the contrary, they acknowledged the

---

165. *WRTL II*, 127 S. Ct. at 2670 n.8. The principal opinion added its view that the “vast majority language” was dicta and not binding on the Court. See *id.*

166. Justice Scalia had no problem discerning the purpose of the ad:

The purpose of the ad was to put political pressure upon Senator Feingold to change his position on the filibuster—not only through the constituents who accepted the invitation to contact him, but also through the very existence of an ad bringing to the public’s attention that he, Senator Feingold, stood athwart the allowance of a vote on judicial nominees. (Unlike the principal opinion, I think that is the fair import of the ad in context).

*Id.* at 2684 n.8 (Scalia, J., concurring).

167. See *id.* at 2669 n.7 (principal opinion).

168. *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

169. The most disingenuous passage in the principal opinion concerns a piece of legislation that the House of Representatives was considering during the electioneering communications window. “There would be no reason to regard an ad supporting or opposing that Act, and urging citizens to contact their Representatives about it, as the equivalent of an ad saying vote for or against the Representative.” *WRTL II*, 127 S. Ct. at 2667. The history of pre-BCRA advertising just before an election makes clear that most of such advertising mentioning a federal candidate had an electoral purpose, a point which a majority of the Court appears to accept. See *id.* at 2670 n.8 (noting that the Court in *McConnell* accepted the idea that the “vast majority” of such ads had an electioneering purpose); see also *id.* at 2684 n.8 (Scalia, J., concurring) (noting the purpose of *WRTL*’s advertisement).

line may now be impossible to draw.<sup>170</sup> They likely predicted that their test would lead to the end of effective limits on corporate and union election-related spending from general treasuries. That result appears well in line with the First Amendment deregulatory tone of the opinion.

If that is the case, it at first appears to be a jurisprudential mystery why the two newest Justices did not simply sign on to Justice Scalia's opinion, which would have overturned *McConnell* and *Austin* on this point.<sup>171</sup> The answer to the mystery is political, not jurisprudential. Having promised moderation and incrementalism during his confirmation hearings,<sup>172</sup> Chief Justice Roberts apparently did not want to pay a political cost for appearing to move too quickly to overturn precedent.<sup>173</sup> But regardless of appearances, the opinion cannot be reconciled with the *McConnell* case decided just a few years before.

## 2. The Abandonment of *Austin* and *Beaumont* and the Misinterpretation of *Bellotti*

The principal opinion in *WRTL II* not only turns *McConnell*'s section 203 holding on its head; it also undermines the Court's earlier treatment of corporate spending in candidate elections from *Austin*<sup>174</sup> and *Beaumont*.<sup>175</sup> Further, it calls into question the continued constitutionality of a PAC requirement for corporate (and union) general treasury spending on advertisements *expressly advocating* the election or defeat of candidates for federal office.<sup>176</sup>

In *Buckley*,<sup>177</sup> the Court did not reach the question whether election-related spending limits, unconstitutional as applied to

---

170. See *id.* at 2669 (principal opinion) ("At best, appellants have shown what we have acknowledged at least since *Buckley*: that 'the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.' . . . Discussion of issues cannot be suppressed simply because the issues may also be pertinent to an election.").

171. See *id.* at 2679 (Scalia, J., concurring).

172. See *supra* note 12 and accompanying text.

173. This is a pattern that marked the Court's 2006 Term aside from the campaign finance cases. Vikram David Amar, *The Supreme Court's Problematic Use of Precedent over the Past Term: Why Overruling or Refashioning May, in Some Cases, Be Better Than Selective Interpretation*, FINDLAW, July 20, 2007, <http://writ.news.findlaw.com/amar/20070720.html>.

174. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

175. *FEC v. Beaumont*, 539 U.S. 146 (2003).

176. See, e.g., *id.* at 156.

177. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

individuals, could still be constitutional as applied to corporations. In *Bellotti*, the Court took the strongest position (until *WRTL II*) in favor of corporate First Amendment rights in the context of noncandidate ballot measure elections.<sup>178</sup> But the Court there was careful in *Bellotti* to drop a footnote refusing to undermine federal and state law limiting corporations from spending general treasury funds in candidate elections.<sup>179</sup>

In *Austin*, the Court directly held that corporations *could* be limited to using PAC funds to pay for express advocacy in *candidate* elections based upon the “distortion” that corporate spending can cause to the electoral process.<sup>180</sup> In *McConnell*, the Court extended *Austin* to unions<sup>181</sup> (without explaining how the “distortion” rationale might apply to labor union members)<sup>182</sup> and to nonexpress advocacy in the form of corporate and union electioneering communications.<sup>183</sup> In addition, just before *McConnell*, the Court in *Beaumont* upheld a ban on *MCFL*-type corporations’ campaign contributions to election campaigns, in language that sharply denigrated the value of corporate First Amendment rights.<sup>184</sup>

Without directly overruling *Austin* or *Beaumont*, the *WRTL II* principal opinion seriously undermined them by repeatedly trumpeting the value of corporate free speech rights and desecrating what the opinion termed “censorship.”<sup>185</sup> The principal opinion then tried to shove the *WRTL* case—about a candidate election—into the rules from *Bellotti* governing ballot measure elections.<sup>186</sup> First, the principal opinion concluded (quite correctly and obviously) that the *WRTL* advertisements did not include express advocacy.<sup>187</sup> Then, after adopting a quite stingy definition of the “functional equivalent” of express advocacy,<sup>188</sup> the principal opinion determined that *WRTL*’s ad-

---

178. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

179. *Id.* at 788 n.26.

180. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

181. *McConnell v. FEC*, 540 U.S. 93, 207 (2003).

182. See Hasen, *supra* note 2, at 56–57 (criticizing the *McConnell* Court for failing to explain how the *Austin* rationale applied to unions).

183. *McConnell*, 540 U.S. at 204–06.

184. See *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003).

185. See *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2671 n.9, 2674 (2007); see also *supra* text accompanying note 146 (quoting the Court’s rejection of the idea that the PAC alternative was sufficiently speech-protective of the rights of corporations and unions).

186. See *WRTL II*, 127 S. Ct. at 2671–73.

187. See *id.* at 2667.

188. See *id.*

vertisements were not the functional equivalent of such advocacy.<sup>189</sup> That left the ads looking like “issues ads,”<sup>190</sup> which the Court saw as closely related to the ballot measure election advertising that the Court in *Bellotti* held could be paid for with corporate funds.<sup>191</sup> This conflation ignored the fact that the WRTL ads were in fact likely to affect voter choices in the outcome of elections.<sup>192</sup> Therefore the ads fairly fell into the category of candidate election speech that Congress sought to regulate in section 203 of the BCRA.<sup>193</sup>

To bolster the analogy to *Bellotti*, the principal opinion misstated *Bellotti*’s holding. It claimed that the *Bellotti* Court had rejected the proposition “that the PAC option would justify regulation of all corporate speech.”<sup>194</sup> However, the Massachusetts corporation considered in *Bellotti* did not have an option to try to influence the outcome of the ballot measure election using a PAC, and the *Bellotti* Court never addressed the issue, contrary to *WRTL II*’s intimation.

In the end, the *WRTL II* principal opinion does something I thought impossible. It took the already irreconcilable and incoherent distinction between the treatment of corporate election spending in candidate- and ballot-measure elections set forth in *Bellotti* and *Austin* and confused the issue even more. The clear import of the principal opinion is that any limits on corporate and union spending in elections—candidate or ballot measure—violate the First Amendment. But the Court refused to take the final step of applying its reasoning to *Austin* and *McConnell*. For the sake of clarity and coherence, the Justices should have done so.

### 3. Ignoring *Randall*’s Competitiveness Test

The third inconsistency within *WRTL II* involves the Court’s 2006 opinion, *Randall v. Sorrell*, which struck down Vermont’s campaign finance contribution limits as too low.<sup>195</sup> In that case, Justice Breyer, writing for himself and Chief Justice Roberts and Justice Alito, wrote the controlling opinion.<sup>196</sup>

---

189. *See id.* at 2670.

190. *Id.* at 2672.

191. *Id.* at 2671–72.

192. *See id.* at 2660–61 (describing WRTL’s ads).

193. *See* 2 U.S.C. § 441b(b)(2) (Supp. V 2007).

194. *WRTL II*, 127 S. Ct. at 2671 n.9.

195. 126 S. Ct. 2479, 2500 (2006).

196. *See id.* at 2485.

The opinion held that the Vermont limits were too low because they prevented challengers from mounting effective campaigns.<sup>197</sup>

"Competitiveness" has proven to be a one-trick pony. The *WRTL II* principal opinion did not cite to *Randall*, nor do the words "competition" or "competitiveness" appear in the principal opinion. Though the principal opinion discussed the purpose of the First Amendment as promoting robust debate,<sup>198</sup> nowhere did the Court determine how broadly or narrowly to craft an as-applied exemption based upon how it was likely to affect the competitiveness of campaigns. The principal opinion did not explain how competition, an issue that was decisive in the campaign contribution context just a year before, now became utterly irrelevant.

#### 4. Inconsistent Treatment of Effects Tests

In crafting the as-applied test, the principal opinion in *WRTL II* purported to reject any test that would separate election ads from "genuine issue ads" based upon either the intent of the speaker or the likely effect of the advertisement on an election.<sup>199</sup> The Court said that such a test would be impermissible because it would put the speaker at the mercy of the varied understanding of the hearers and would lead to burdensome and expert-driven litigation.<sup>200</sup>

The principal opinion's test, however, is also an effects test. In determining whether an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,"<sup>201</sup> a court (or an administrative body such as the FEC) needs to ask what a hearer would believe to be a reasonable interpretation of the advertisement. Consider the hypothetical advertisement posed above: "Jane Doe wants to be your president, but Jane Doe's position on global warming is evil. Don't let her ruin the world." A court cannot determine whether the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate *without considering how hearers would react to the advertisement*. The court would need to ask: is it reasonable (for someone?) to view this ad as something beside an appeal to vote for or

---

197. See *id.* at 2492, 2500.

198. See *WRTL II*, 127 S. Ct. at 2665.

199. See *id.* at 2665–66.

200. *Id.* at 2666.

201. *Id.* at 2667.



against a candidate, such as an ad on the “issue” of “global warming” and Doe’s position on it?

The principal opinion’s test shifts the burden<sup>202</sup> and gives the “tie” to corporations who wish to engage in election-related spending.<sup>203</sup> Under this test, few advertisements will in fact fall into the category of “no reasonable interpretation”<sup>204</sup> as anything other than an appeal for or against a candidate. It is therefore less burdensome than some other effects tests.<sup>205</sup> But that does not take away from the key point that in making the determination of whether an advertisement is subject to an exemption, a decision maker is going to have to consider *the effect* of the advertisement on the electorate.<sup>206</sup>

In all, the principal opinion cannot be read as either consistent with recent precedent or even internally inconsistent in its treatment of electoral effects. This is not to say that the principal opinion’s *result* was incorrect—this is a question about which reasonable people will disagree. But, rather than try to craft a more politically palatable opinion, the Chief Justice and Justice Alito should have been honest and simply joined Justice Scalia’s forthright embrace of deregulation.<sup>207</sup> Coherence has virtues the principal opinion ignores.

---

202. *Id.* at 2663–64 (describing the applicable standards of review and required demonstrations of proof).

203. *See id.* at 2669 (“Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”).

204. *See id.* at 2667 (describing the no-reasonable-interpretation test).

205. In the amicus brief I coauthored with Professor Briffault, we proposed the following specific effects test: “[T]hat a corporation should be entitled to an as-applied exemption from the PAC requirement for electioneering communications *only when it proves that an identifiable type of communication is unlikely to have any appreciable effect on voters’ choices in the election.*” Brief Amici Curiae, *supra* note †, at 4. Like the principal opinion, we found an intent test unworkable. *Id.* For Professor Briffault’s views of the *WRTL II* case, see generally Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road*, 1 ALB. GOV’T L. REV. 101 (2008).

206. *See WRTL II*, 127 S. Ct. at 2680 (Scalia, J., concurring) (characterizing the principal opinion’s test and other tests as one “tied to the public perception, or a court’s perception, of the import, the intent, or the effect of the ad”).

207. For a forceful argument to the contrary, see Edward B. Foley, *Precedent and Judicial Responsibility*, ELECTION LAW @ MORITZ, July 3, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=161>. For

another charitable view of the principal opinion, see Allison R. Hayward, *Politics as Usual: The Latest Supreme Court Ruling Won’t Bring a Sea Change in Campaign Finance*, LEGAL TIMES, July 9, 2007, at 50 (“On the other hand, Roberts’ *Wisconsin Right to Life* decision fits the profile of many of the Court’s other decisions. He joins a line of justices who have attempted to craft a middle way. For this, Justice Antonin Scalia’s feisty concurrence calling for a

## II. THE PRACTICAL EVISCERATION OF THE CORPORATE AND UNION PAC REQUIREMENT

In this Part, I turn away from theory and toward the practical implementation of the *WRTL II* principal opinion's test for separating the functional equivalent of express advocacy (which may be subject to the corporate and union PAC requirement of section 203 of the BCRA) and genuine issue advocacy (which may be paid for directly out of corporate and union general treasury funds). I conclude that the principal opinion's test will effectively eviscerate the corporate and union PAC requirement for election-related advertising, even though there will remain a number of difficult line-drawing questions to bother academics (and judges, to the extent that BCRA opponents bring more test cases to push Chief Justice Roberts and Justice Alito to embrace campaign finance deregulation more directly).

Consider again the language of the test that the principal opinion sets out to separate the functional equivalent of express advocacy from genuine issue advocacy: "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."<sup>208</sup> And in making that determination, the Court emphasized that

(1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and the intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.<sup>209</sup>

Further, the burden is on the government to prove the advertisement is not subject to an exemption,<sup>210</sup> and in close cases, "the tie goes to the speaker, not the censor."<sup>211</sup>

Though it is not difficult to imagine hypothetical ads that would *fail* the principal opinion's no-reasonable-interpretation test ("Jane Doe wants to be your president, but Jane Doe is an evil person. Don't let her ruin the world."), such ad hominem attacks are a rarity and likely ineffective as a matter of cam-

---

wholesale rejection of the BCRA and Souter's dissent insisting on deference to Congress both give him grief.").

208. See *WRTL II*, 127 S. Ct. at 2667.

209. *Id.* at 2669 n.7.

210. *Id.* at 2663–64.

211. *Id.* at 2669; *id.* at 2674 ("[W]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban[,] . . . we give the benefit of the doubt to speech, not censorship.").

paign policy. The kinds of ads we are now likely to see funded by corporate and union treasuries, in contrast, should fall within *WRTL II*'s safe harbor.

Here is what we know about federal campaign advertising before the BCRA. Very few ads broadcast close to an election that feature candidates for office contain express advocacy,<sup>212</sup> and those that don't almost always mention a legislative issue, even if they are also attacking a candidate.<sup>213</sup> Indeed, in the 2000 Buying Time study, the coders found that over 92.2% of electioneering ads were either solely policy-focused or focused on a combination of policy the personal traits of candidates.<sup>214</sup> Only 7.1% of ads were wholly focused on the personal.<sup>215</sup>

These findings should not be surprising. Viewers or listeners want to know *why* Doe should be considered evil and likely respond poorly to ad hominem attacks. Campaign consultants can tell them why they should not support Doe by simply tying Doe to, as the *WRTL II* principal opinion put it, "a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future."<sup>216</sup> Note the breadth of this standard. What issue is unlikely to become the subject of legislative scrutiny by some member of Congress in the near future? In 2006, for example, there were 3738 bills introduced into Congress,<sup>217</sup> and of course many more potential bills that *could have been* introduced on topics ranging from taxes to Iraq to national defense to pu-

---

212. "It is undisputed that very few ads—whether run by candidates, parties, or interest groups—used words of express advocacy." *McConnell v. FEC*, 540 U.S. 93, 127 n.18. The *McConnell* Court added that "[i]n the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%." *Id.*

213. See *id.* at 126–27 (discussing ads that condemn candidates on specific issues).

214. HOLMAN & MCLOUGHLIN, *supra* note 88, at 32 fig.4.9. Though the principal opinion was quite critical of the Buying Time studies, it was not on the coding of this particular issue. See *WRTL II*, 127 S. Ct. at 2665 n.4 (discussing the use of the study in *McConnell v. FEC*, 251 F. Supp. 2d 176, 307–12, 585–88 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003)). Nor is there any reason to think that Justices Roberts or Alito would reject the point that most electioneering communications advertisements run before the BCRA mentioned issues that were the subject, or could soon be the subject, of legislative scrutiny.

215. HOLMAN & MCLOUGHLIN, *supra* note 88, at 32 fig.4.9.

216. *WRTL II*, 127 S. Ct. at 2669 (quoting *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006), *aff'd* 127 S. Ct. 2652 (2007)).

217. 152 CONG. REC. D1170, D1173 (daily ed. Dec. 27, 2006) (listing data on legislative activity in 2006).

nishment for sex offenders. As the Court noted in *Republican Party of Minnesota v. White*,<sup>218</sup> reviewing a law barring a judicial candidate from “announcing” his or her position on issues likely to come before the courts, “there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”<sup>219</sup> The same is true of issues that could be considered by legislators.

Thus, most ads that have a purpose to affect, or are likely to affect federal elections will comfortably fall on the permitted side of the line created by the *WRTL II* principal opinion. Simply put, for most ads there *will* be a reasonable interpretation of even an ad likely to affect the outcome of a federal election that it is something other than an appeal to vote for or against a specific candidate.

There is of course room for argument along the edges. How “likely” does it have to be that an issue would be the subject of legislative scrutiny to count under the new test? How much “scrutiny” or potential scrutiny does there have to be by a legislator to count? The principal opinion does not say. But ads on health care, taxes, the environment, education, or Iraq surely are subject to “legislative scrutiny” and will likely to be “issues” discussed in ads run before the 2008 election.

The biggest unanswered question the principal opinion raises is whether condemnation of a candidate for office would take an ad outside the no-reasonable-interpretation test.<sup>220</sup> The test itself does not mention condemnation of a candidate as directly relevant, so it is quite probable that a court would conclude that an ad that calls Jane Doe’s position on global warming “evil” could still be considered a genuine issue ad not constitutionally regulated under section 203. One “reasonable interpretation” of the ad (though perhaps not the best interpretation of the ad if we were allowed—though we are not—to view it in the context of the campaign) is that it is about the issue of global warming.

But in an important footnote, the principal opinion may have muddied the waters. It suggested that an advertisement is subject to no reasonable interpretation as anything other than an appeal to support or oppose a candidate if it contains

---

218. 536 U.S. 765 (2002).

219. *Id.* at 772 (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

220. See *WRTL II*, 127 S. Ct. at 2698–99 (Souter, J., dissenting) (criticizing the principal opinion’s treatment of condemnation ads).

language of condemnation. The principal opinion sought to distinguish WRTL's ads from a hypothetical Jane Doe ad mentioned in *McConnell*, condemning Jane Doe's position on an issue and urging voters to call Doe to tell her what they think about her position:

But [the Jane Doe] ad "condemned Jane Doe's record on a particular issue." WRTL's ads do not do so; they instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters.<sup>221</sup>

The footnote builds upon the principal opinion's statement that WRTL's ads are not like express advocacy because they "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter."<sup>222</sup> Further, they "do not mention an election candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."<sup>223</sup>

There is certainly room for debate on the question of how to treat condemnatory ads under the *WRTL II* principal opinion test. The other seven Justices on the Court believed a condemnatory Jane Doe ad would now be exempt under the no-reasonable-interpretation test.<sup>224</sup> Indeed, as Justice Scalia remarked in his concurrence, the principal opinion's test "at least arguably protects the most 'striking' example of a so-called sham issue ad in the *McConnell* record, the notorious 'Yellow-tail ad,' which accused Bill Yellowtail of striking his wife and then urged listeners to call him and '[t]ell him to support family values.'"<sup>225</sup> It is not clear whether lower courts and the FEC should follow what the controlling opinion says the test means, or what a contrary majority of the Court says it means—there

---

221. *Id.* at 2667 n.6 (principal opinion) (citing *McConnell v. FEC*, 540 U.S. 93 (2003)).

222. *Id.* at 2667.

223. *Id.*

224. *Id.* at 2683 n.7 (Scalia, J., concurring) ("While its coverage is not entirely clear, [the principal opinion's test] would apparently protect even *McConnell*'s paradigmatic example of the functional equivalent of express advocacy—the so-called 'Jane Doe ad.'"); *id.* at 2699 (Souter, J., dissenting) ("If it is now unconstitutional to restrict WRTL's Feingold ads, then it follows that [section] 203 can no longer be applied constitutionally to *McConnell*'s Jane Doe paradigm.").

225. *Id.* at 2683 n.7 (Scalia, J., concurring).

are self-serving reasons for each set of Justices to exaggerate or minimize the significance of the principal opinion's holding.<sup>226</sup>

But these debates are of interest mostly to academics and to those litigants who might want to push the Court further. As far as practicalities, it will be easy to avoid express words of condemnation (as well as explicit mentions of the candidate's candidacy, character, and fitness for office) while still crafting an effective ad. Consider: "As a member of Congress, Jane Doe voted seven times against a treaty that would have stopped global warming. Call Jane Doe and tell her you think her position on global warming is just plain wrong." As with the old "issue advocacy," it will be "child's play for campaign professionals to develop ads that effectively advocate or oppose the cause of a

---

226. Just before the 2008 primary season, the FEC issued a set of guidelines creating a *WRTL* exemption from the requirement that corporations and unions pay for electioneering communications from separate PAC funds. See Electioneering Communications, 72 Fed. Reg. 72,899, 72,913-15 (Dec. 26, 2007) (to be codified at 11 C.F.R. pts. 104, 114). Before it was promulgated, there was a great deal of debate within and outside the FEC over the contours of the final rule. See Susan Crabtree, *FEC Decision Could Launch Attack Ads, Watchdogs Warn*, HILL, Nov. 20, 2007, at 1.

In essence, the FEC rule works as follows: if an advertisement that otherwise qualifies as an electioneering communication avoids mentioning "any election, candidacy, political party, opposing candidate, or voting by the general public," and it does not "take a position on any candidate's or officeholder's character, qualifications or fitness for office," but it focuses on a legislative, executive, or judicial matter or issue and "[u]rges a candidate to take a particular position or action with respect to the matter or issue," or "urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue," the ad falls in the safe harbor and may be paid for with corporate or treasury funds. Electioneering Communications, 72 Fed. Reg. at 72,914 (to be codified at 11 C.F.R. pt. 114.15). A separate exception applies for advertising that proposes a commercial transaction. *Id.* If the communication does not fall in the safe harbor, for example, an electioneering communication that mentions an election or a candidate's fitness for office, then the Commission

will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

*Id.* It remains to be seen how the FEC will in fact rule on communications outside of the safe harbor. But the safe harbor itself, consistent with the principal opinion in *WRTL II*, allows a great deal of the kinds of sham issue advocacy that existed before the passage of the BCRA. See Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/009764.html> (Nov. 20, 2007, 12:57 EST).

candidate but fall short of” failing the principal opinion’s new test.<sup>227</sup>

What will the new test mean for corporate and union spending in future elections? While the picture is not entirely clear, we should see a rise in corporate spending on both the federal level and on the state and local level in those jurisdictions that impose similar limits to the federal limits. Union spending may not rise as much, because unions did not cut back much on their spending under the BCRA.

Corporate spending from general treasury funds on federal elections fell fairly considerably after the BCRA. Title I of the BCRA (not at issue in *WRTL II*) barred corporations, unions, and others from giving large donations to political parties (so-called soft money) for the parties to pay for issue advertisements and other related activities.<sup>228</sup> Of corporations giving more than \$100,000 in soft money in both 2000 and 2002, the amount of spending from corporate treasury funds fell from \$113.2 million (in soft money) in 2000 to \$6.1 million (given to 527 organizations)<sup>229</sup> in 2004.<sup>230</sup> Even without *WRTL II*, I would have expected corporate spending to rise in the 2008 election, as some of the uncertainty surrounding donations to 527 organizations gets resolved<sup>231</sup> and given the expected competitiveness of both the presidential and congressional contests. It is not clear that the amounts would have reached pre-BCRA

---

227. *First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 23 (1999) (statement of Richard Briffault, Professor, Columbia Law School).

228. See *McConnell v. FEC*, 540 U.S. 93, 143–44 (2003) (describing the soft money provisions in Title I of the BCRA).

229. So-called 527 organizations are nonparty organizations that arose after the BCRA to engage in spending intended to influence the outcome of federal elections but not subject to either the soft money rules or the \$5000 individual contribution limits applicable to political committees. See Briffault, *supra* note 21, at 949–55. Litigation related to the constitutionality (and permissibility under FECA) of regulating 527 organizations arose in connection with the 2004 election and continues today. See *id.* See generally Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79* (Michael J. Malbin ed., 2006) [hereinafter *ELECTION AFTER REFORM*].

230. Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in *ELECTION AFTER REFORM*, *supra* note 229, at 112, 118.

231. See Allan J. Cigler, *Interest Groups and Financing the 2004 Elections*, in *FINANCING THE 2004 ELECTION* 208, 228 (David B. Magleby et al. eds., 2006) (“A series of corporate scandals had made many businesses uneasy about contributing disclosed funds to 527s without FEC approval. Moreover, businesses are generally wary of funding new groups.”).

levels, as some soft money was likely given by corporations to curry favor with elected officials who demanded the donations.<sup>232</sup> But *WRTL II* creates an opening for corporations to give much larger sums for issue ads in the 2008 campaign—particularly if they can more easily disguise their identities behind trade groups or groups with generic and innocuous names.<sup>233</sup>

Corporations have not been shy in the past to get involved in congressional and other races where they have strong institutional interests in the results.<sup>234</sup> With the possibility of a Democratic Congress and a Democratic president in 2008, I expect some serious corporate money to now appear on the table. We already have seen considerable corporate spending on judicial elections where corporate interests are at stake. In those states with state supreme courts considering tort reform, business involvement in elections has been substantial. For example, “[i]n 2004, *all* of the group spending on television advertising in Alabama [state judicial election contests] came from pro-business groups intent on protecting sitting Republican justices perceived to be business-friendly.”<sup>235</sup>

It is less clear that *WRTL II* will cause a rise in labor union spending on elections, at least on the federal level. This is not because unions are less interested than corporations in election-related spending; it is because “most of the[] dollars” that unions had directed to party soft money before the BCRA “appear to have been spent elsewhere, either directly or in the form of contributions to Democratic-leaning 527s.”<sup>236</sup>

---

232. See Boatright et al., *supra* note 230, at 120 (“Many large corporations give contributions not so much to affect election outcomes as to develop and maintain a relationship with an officeholder. . . . When large corporations used institutional (corporate treasury) money to give soft money, they typically were responding to requests from officeholders, party officials, or their agents.”).

233. See *id.* at 125.

234. See David B. Magleby, *The Importance of Outside Money in the 2002 Congressional Elections*, in *THE LAST HURRAH? SOFT MONEY AND ISSUE ADVOCACY IN THE 2002 CONGRESSIONAL ELECTIONS* 1, 14 (David B. Magleby & J. Quin Monson eds., 2004) (“Corporate and treasury funds have been a component of party soft-money receipts and a major source of electioneering issue advocacy since 1996.”).

235. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES IN JUDICIAL ELECTIONS* 73, 82 (Matthew J. Streb ed., 2007).

236. Thomas E. Mann, *Lessons for Reformers*, in *FINANCING THE 2004 ELECTION*, *supra* note 231, at 241, 249.



In sum, the *WRTL II* principal opinion's test separating the functional equivalent of express advocacy, which must be paid for by corporate or union PAC funds, from genuine issue advocacy, which may be paid for from corporate or union treasury funds, provides a broad safe harbor for corporations and unions. It allows them to spend large sums seeking to influence the outcome of elections. Though there are line-drawing problems that may vex academics and courts, corporations and unions can safely stay within the limits of the law and still run ads likely to affect and intended to affect the outcome of elections. We should expect to see much more corporate-funded election advertising in future elections.

### III. THE FUTURE DEREGULATION OF CAMPAIGN FINANCE

The final Part of this Article turns to the future, and looks at various additional campaign finance laws that may be challenged under the authority of the *WRTL II* principal opinion. To be sure, this effort to predict the future is difficult because much depends upon the personnel of the Court as the Justices confront new campaign finance cases. For example, while the Court was in its New Deference mode, I thought a very credible argument could be made to impose additional campaign finance limitations on ballot measure elections.<sup>237</sup> But Justice O'Connor's replacement by Justice Alito has changed the valence of the Court on campaign finance issues, and predictions I made in 2004 and 2005 based upon the prior Justices' positions no longer hold in 2007 or 2008.

Nonetheless, there is reason to believe that the Court will continue to side with campaign finance deregulation over the next decade. Although currently there is a conservative-liberal split on the current Supreme Court on this issue (with the more liberal members of the Court more willing to uphold campaign finance regulation), that split does not appear consistently to explain positions beyond the Court. Consider, for example, former Stanford Law School Dean Kathleen Sullivan, who many observers believe could be on any Democratic president's short list for the Supreme Court.<sup>238</sup> Sullivan is certainly a liberal, but

---

237. See Hasen, *supra* note 3, *passim*.

238. See Posting of Tom Goldstein to SCOTUSBlog, [http://www.scotusblog.com/movabletype/archives/2007/07/the\\_democratic.html](http://www.scotusblog.com/movabletype/archives/2007/07/the_democratic.html) (July 12, 2007, 11:12 EST) (listing potential Democratic Supreme Court nominees).

she has been outspokenly hostile to campaign finance regulation.<sup>239</sup>

More immediately, if the current members of the Supreme Court remain on the Court, what would that mean for challenges to other campaign finance regulations? *Randall* and *WRTL II* make clear that Chief Justice Roberts and Justice Alito form the controlling bloc on campaign finance questions, and they have sent strong signals through the tone of their opinions that they are both very skeptical of campaign finance regulation challenged under the First Amendment. They are quite willing to entertain challenges to existing campaign finance precedents in future cases. It is worth recalling that Justice Alito separately concurred in both *Randall* and *WRTL II* to invite litigants to bring facial challenges to *Buckley*'s contribution limits and to *McConnell*'s upholding section 203 of the BCRA against a facial challenge.<sup>240</sup>

Though the Roberts Court's faux minimalist approach in *WRTL II* allows for some variation in how lower courts will address campaign finance challenges in the near term, the lower courts' pre-*McConnell* experience demonstrates that many lower courts are likely to strike down ever more campaign finance regulations on First Amendment grounds.<sup>241</sup> Before *McConnell*, for example, the Fourth Circuit held that an advertisement broadcast before the 1996 presidential election that focused on Bill Clinton's so-called homosexual agenda was an ad about the issue of homosexuality, and not an ad meant to attack Bill Clinton.<sup>242</sup> Those few appellate courts that take a more defe-

---

239. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 664 (1997) ("[T]he much belittled constitutional case against campaign finance limits is surprisingly strong, and . . . the better way to resolve the anomalies created by *Buckley v. Valeo* may well be not to impose new expenditure limits on political campaigns, but rather to eliminate contribution limits.").

240. *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2674 (2007) (Alito, J., concurring); *Randall v. Sorrell*, 126 S. Ct. 2479, 2500 (2006) (Alito, J., concurring).

241. See DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* 922 n.8 (2d ed. 2001) (noting that, as of 2001, with the exception of one case, "lower courts have been uniformly hostile to attempts to regulate issue advocacy consistent with the First Amendment"); see also *id.* at 923–24 (discussing lower court cases before the Supreme Court's opinion in *Shrink Missouri* striking down campaign contribution limits as unconstitutionally low).

242. *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1058 (4th Cir. 1997) ("The text of the television advertisement is nonprescriptive, taking no position whatever . . . on the candidacy of Governor Clinton . . .").

rential approach to campaign finance laws, such as the Second Circuit in *Randall*,<sup>243</sup> likely will face Supreme Court reversal.

Attorneys such as Jim Bopp are likely to bring additional challenges to both the BCRA and other campaign finance laws.<sup>244</sup> I expect to see challenges to laws upheld by the Supreme Court in the past, such as the ban on corporate and union spending from treasury on express advocacy.<sup>245</sup> I also expect to see challenges to laws that the Supreme Court has not directly addressed, such as a challenge to the constitutionality of contribution limits to independent expenditure committees and 527 organizations.<sup>246</sup>

I expect most of these challenges would succeed before the currently constituted Roberts Court. On the corporate/union PAC requirement for express advocacy, it is not a large step at all from the principal opinion in *WRTL II* to a holding overruling *Austin* and *McConnell* on this point. The Court could simply quote those parts of the *WRTL II* opinion extolling the First Amendment virtues of free speech, and criticizing the ban that criminalizes corporate free speech in candidate elections—an opinion reaching the conclusion that Chief Justice Roberts and Justice Alito resisted acknowledging in *WRTL II*. Over time, these Justices will probably be less sensitive to a need to appear to be taking minimalist or incremental steps away from existing precedent.

Nor would it be much of a stretch, once the Court has overturned *McConnell*'s holding on issue advocacy, for the Court to overturn *McConnell*'s soft-money holding. The Court could recognize the "rights" of wealthy individuals, corporations and un-

---

243. *Landall v. Sorrell*, 382 F.3d 91, 97 n.1 (2d Cir. 2004), *rev'd sub nom.* *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) ("Just as the *McConnell* Court deferred to Congress'[s] 'predictive judgments' about the need for federal regulation of soft-money contributions, we respect the Vermont Legislature's similar reliance—in enacting regulations on both campaign contributions and expenditures—on its substantial historical experience with campaign finance reform and its informed predictions about Vermont candidate and donor behavior." (citation omitted)).

244. See Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/008914.html> (July 19, 2007, 10:25 EST) (quoting *WRTL*'s attorney Jim Bopp as commenting that if the FEC does not craft a broad rule implementing the Supreme Court's *WRTL II* decision, "expect the Court to seriously consider striking the whole 'electioneering communication' prohibition and I bet that they will get that opportunity").

245. See 2 U.S.C. § 441b (2000); see also *supra* notes 18–20 and accompanying text.

246. See generally Briffault, *supra* note 21, at 970–90.

ions to fund genuine issue ads through six- and seven-figure donations to political parties. After all, if corporations could spend directly on such ads, shouldn't the First Amendment allow for such spending by proxy? This kind of argument could be bolstered by an appeal to the special role of political parties in fostering elections and democracy, a role the Court acknowledged after *McConnell* in *Randall*.<sup>247</sup>

Once the Court has taken this step, it could then turn to reconsider the constitutionality of *any* contribution limits, perhaps in a challenge to the current federal individual contribution limits or to another state law. One form of challenge would be to argue that even at these amounts it is impossible for challengers to mount effective campaigns.<sup>248</sup> Another argument would be the one that Justice Thomas has advanced, that campaign contribution laws should be subject to strict scrutiny and fail such scrutiny because contribution limits of even a few thousand dollars are not narrowly tailored to prevent corruption.<sup>249</sup>

It is less clear how the two newest Justices, as well as Justice Kennedy,<sup>250</sup> would react to such an argument, but it would not be too surprising, given *WRTL II*, for them to be swayed by it. The anticorruption/appearance of corruption rationale has carried too much weight in recent years in the New Deference cases, and a reaction in the other direction denying any force at all to the argument would have some appeal to those who recoiled at the New Deference.

Even if the Court were not willing (or not yet willing) to completely jettison the anticorruption argument for campaign contributions to candidates, the Court could rule that contributions to independent expenditure committees may not be constitutionally limited to \$5000, as current law requires. A Court majority may reason that if an individual has a First Amendment right to make unlimited expenditures supporting or opposing a candidate for office so long as that spending is inde-

---

247. *Randall*, 126 S. Ct. at 2496–97 (recognizing that low contribution limits “threaten[] harm to a particularly important political right, the right to associate in a political party”).

248. *See id.* (“[T]he critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*.”).

249. *See id.* at 2502 (Thomas, J., concurring) (“I would overrule *Buckley* and subject both . . . contribution and expenditure limits . . . to strict scrutiny, which they would fail.”).

250. *See supra* note 150 (detailing Justice Kennedy’s evolving approach to campaign finance statutes).

pendent, arguably individuals have a First Amendment right to band together to accomplish the same purpose. The independence in both circumstances supposedly prevents the corruption of candidates for office.

Finally, it is possible that the Roberts Court might entertain a challenge to laws requiring the disclosure of ads likely to influence the outcome of elections. Section 203 of the BCRA requires corporations and unions to use PACs to fund electioneering communications.<sup>251</sup> Furthermore, section 201 of the law also requires *anyone*, including individuals who spent more than \$10,000 on electioneering communications, to file reports of contributions and expenditures with the FEC.<sup>252</sup>

In the *WRTL* case, the plaintiff did not challenge section 201, and agreed to file the requisite disclosure reports with the FEC and include disclaimers on its advertising.<sup>253</sup> But Jim Bopp, the lawyer who represented WRTL, has argued before the FEC for the extension of the as-applied exemption to the BCRA's disclosure provisions as part of the FEC's rulemaking procedure to craft regulations implementing the *WRTL* decision.<sup>254</sup>

This argument will be considerably harder to make to the current Court. In *McConnell*, the Justices voted 8-1 to uphold section 201 of the BCRA against an argument that compelled disclosure violated the First Amendment.<sup>255</sup> Only Justice Tho-

---

251. See Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 434(f)(1) (Supp. V 2007).

252. See *id.* § 201, 2 U.S.C. § 434(f)(1).

253. See Brief of Appellee at 10, *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652 (2007) (Nos. 06-969, 06-970) ("WRTL challenged the *prohibition*, not *disclosure*, and was prepared to provide the full disclosure required under BCRA."); see also *id.* at 10 n.18 ("Full disclosure of WRTL's identity and activities as required by law would have been forthcoming. WRTL's ads contained the disclaimers required by 11 C.F.R. § 110.11." (citation omitted)).

254. See generally James Bopp, Jr. & Richard E. Coleson, Gen. Counsel, James Madison Ctr. for Free Speech, Comments on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) (Oct. 17, 2007), available at <http://www.jamesmadisoncenter.org/Finance/MadisonCenterCommentsReWR-TLII.pdf>. Professor Briffault and I filed a letter with the FEC urging it not to extend the as-applied exemption to the BCRA's disclosure provisions. See Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/009393.html> (Sept. 28, 2007, 12:46 EST).

255. See *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (upholding section 201 of the BCRA); *id.* at 321 (Kennedy, J., concurring) (agreeing with the Court that section 201—except for the advance disclosure requirement—was constitutional).

mas was swayed by that argument.<sup>256</sup> This means that even if Chief Justice Roberts and Justice Alito agreed with Justice Thomas about campaign finance anonymity (a point not at all evident from their views in *Randall* and *WRTL II*), Justices Scalia and Kennedy might not agree. Justice Scalia dissented in *McIntyre v. Ohio Elections Commission*, the main case recognizing a right to fund campaign ads anonymously at least in limited circumstances.<sup>257</sup>

This leaves us with a Court that is likely to move heavily toward deregulation, but likely not as far as the pole position on deregulation (rejecting even campaign finance disclosure) occupied by Justice Thomas. But for those who are looking to the Court to move in Justice Thomas's direction, there are a number of "pretty darn good"<sup>258</sup> days likely ahead.

### CONCLUSION

"Enough is enough" is more than just a line from the *WRTL II* principal opinion rejecting an argument apparently that was not advanced by the government or intervenors in the case. It is the new rallying cry of the campaign finance deregulationists, who were deflated and dejected after *McConnell*,<sup>259</sup> but who now will be emboldened by the decision in *WRTL II*. It is the tease from the pivotal Justices that more is yet to come.

The *WRTL II* principal opinion is artful, both in the sense of showing great skill and in its (at least mild) disingenuousness. It is also somewhat schizophrenic, containing all the First Amendment deregulatory bombast of a campaign finance opinion by Justice Scalia or Thomas but without the expected follow-through declaring core campaign finance regulation un-

---

256. See *id.* at 275 (Thomas, J., concurring) ("I must now address an issue on which I differ from all of my colleagues: the disclosure provisions in BCRA section 201 . . .").

257. See 514 U.S. 334, 371, 385 (1995) (Scalia, J., dissenting) (calling the majority's opinion "a distortion of the past that will lead to a coarsening of the future"); see also *id.* at 357 (majority opinion).

258. See Posting of Brad Smith to Redstate, [http://www.redstate.com/blogs/sections/special\\_features/fec](http://www.redstate.com/blogs/sections/special_features/fec) (June 25, 2007, 11:37 EST) ("Monday's Supreme Court decision . . . is cause for a little celebration. It's not a great day for Free Speech, but it's a pretty darn good one.").

259. See, e.g., Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 127 (2004) ("One who finds herself, as I do, largely dismayed by Justices Stevens' and O'Connor's majority opinion and persuaded by the dissenters' views embarks on the task of commenting on the decision in *McConnell v. FEC* with considerable trepidation. One has, after all, been quite thoroughly vanquished." (footnote omitted)).

constitutional and irreparably so. Its ultimate message, however, is not one rejecting the deregulatory position but rather that of “sit tight.” Good things come to those who wait, and the wait may not be very long for deregulationists. It is now time for the campaign finance reformers to be deflated and dejected, and to expect that the coherence likely to emerge from the Supreme Court in the next decade will severely limit the constitutional options for regulation.